

**Independent Contractor Study Committee**  
**Minutes: August 16, 2004**

Attendance: Riley Johnson, Brian Smith, Nancy Butler, Larry Jones, Dave Cogley, Margaret Ore (for Webb Brown), Jacqueline Lenmark, Carl Schweitzer, Jerry Driscoll, Larry Mayo, Jason Miller, Bob Worthington, Jerry Keck and Byron Roberts

Public in Attendance: Pat Murdo

Facilitator: John Andrew

Minutes: Keith Messmer

Maggie Connor reviewed the ideas for the education program that will be implemented if the Committee proposal becomes law. The program would focus on making the IC's, the hiring agents and the general public aware of what an independent contractor relationship is and is not.

Dave: How will you make people aware of the memorandum of understanding?

Maggie: Will use billboards. Need to give real life stories, use Internet Power Point presentations. Draft articles for papers and newsletters, incorporate suggestions we heard from the committee. Participate in Home Shows.

Dave: When would you start?

Maggie: Anticipate starting as soon as it passes the legislature.

Dave: Good because some of what you have here may not apply until then.

Kevin Braun went through the proposed legislation.

Larry Jones: Go to alternative 2 that Jacqueline developed. Perhaps reference the constitution. Recognize Article 1, Section 3 of the constitution. Add "and is working under" in the last line of alternate subsection 2.

Jacqueline: Larry mentioned a statement of intent. It would need to be broader than what is currently in 2. I would amend "contractor receives more in payment". It contradicts the way an IC works and implies that the hiring agent is still an employer. If we do statement of intent we will need to work on this language.

Kevin: The Supreme Court would look at the statement of intent for guidance.

Jerry D: What would the statement of intent say?

Dave: The statement of intent is not language that would be codified, but it would give the Department guidance.

Jerry D: Do you intend to take the existing #2 and include it as the statement of intent?

Dave: These 2 items are only 2 of the issues that would be covered. There will be several others as the bill progresses.

Jerry D: Not offering anything, they are supposed to bid.

Margaret: Say something about “contract with”

Kevin: We can massage, “offer” won’t be in there. It is the intent of the legislature to overturn Wild, to restore the conclusiveness of the IC, to allow to work for a single entity, to all to pay more.

Jerry D: Why do you have to say anything about payment?

Kevin: It is redundant, but need to in order to overturn Wild.

Carl: Stuck in “is working under” the certificate is either valid or it isn’t. How would you determine?

Larry: Just like before Wild. Were you hired as an employee or an IC? Best practice would be the Memorandum of Understanding.

Jerry D: Addressing that everything you do may not be done as an IC.

Carl: Confuses, were you working as IC or employee?

Larry: That is always there, if payment, were taxes withheld, of course that doesn’t help if they are injured before they are paid.

Kevin: In section 120 are we going to include the AB test back in?

Jacqueline: I Would back off from this. The concern is defining status only by possession of a certificate. It doesn’t address the problem, better idea would be to repeal 120 altogether. Move substantive things to section 6.

Dave: The term IC only applied in 201. Change to “a person who holds the certificate”. Cleaner to just remove the IC definition.

Jacqueline: I don’t think this will stand up if you do away with the AB test. Still have the separation; just calling it something different won’t satisfy the court. If all in one section, statute may better stand the scrutiny.

Larry J: On page 32 of Wild the majority of court said section 120 cautions employers that they can’t rely solely on the exemption. If repeal it could be conclusive.

Jason: Would the shuffling of this impede audits or have an impact on determination if IC or not?

Kevin: Section 8 talks about when we can revoke and suspend. The Department will still have the ability to investigate and another section gives authority to C & D employers.

Jacqueline: Intention is not to delete the Department authority. The court may have a problem with only a piece of paper determining the status.

John: AB is contained in section 6. Reason for changing to person?

Jacqueline: To differentiate a person who might be an applicant or an IC. Words weren't being used consistently, inconsistent use of language. We will need to do a search and destroy language check.

Kevin: Internal cross-referencing has not been done yet. Will probably double the size of the bill.

Jerry D: Did you say the court can't use A & B?

Larry: That is right, by removing section 120 we take away the court's ability to use A& B.

Jerry D: So employee if A& B are violated, who do they sue the state?

Larry J: Maybe, if the state has police powers.

Brian: How come the worker can't bring suit to set aside the agreement?

Larry D: The Gonzalez case you can if fraudulently obtained or obtained under duress.

Brian: Don't think anything we can do can remove that right entirely.

Jerry K: The most common would be the hiring agent told me to get this if I wanted to work today.

Jacqueline: Not going to be able to get this if the Department only issues to those who are an IC.

Jerry K: Right, the checks are built in.

Kevin: And if you don't need to get a policy, a new start-up used to have to operate illegally for a period of time.

Jerry D: if you repeal A& B and the Department determines he gets the certificate and he goes to work and gets hurt while employer controlling him, whom does he sue?

Larry: We are trying to make this conclusive.

Jerry D: The burden is on the Department, not the hiring agent, nothing to be done except breach of contract perhaps.

John: The Department may investigate and determine that the person is not an IC on this job.

Brian: This places the penalty on the person violating it, which doesn't happen now.

Larry J: I am convinced that sub (x) is not a good idea to put in here, I propose withdrawing it. On sub (w) should change to say, "Possesses and is working under"

John: Scratch x?

Larry J: After the department, towards the bottom of page 12, add "as provided in new section 6". Make it clear, it is archaic language. Strike "employee" and change to "person".

Jacqueline: Occurs to me that this section is in the Act at all in 1915 to assure a true employee couldn't be persuaded to waive their rights. Better stated in the positive rather than negative.

The discussion continued on changes to the draft proposal. The agreed upon changes were captured by Kevin and will be incorporated in the new draft.

Nancy: It should be in rule that a portion of the fee will be refunded if the application is denied.

Bob: The fee should be in rule also.

Jacqueline: My preference is the \$ amount in the rule with the fee determined so that it will entirely cover the cost of the program.

Riley: I agree, you don't need to come in every 2 years to adjust the fee. If a denial is made refundable, how much would it offset the fee? How much investigation would it take?

Byron: Not setting the fee in statute, what concerns would that cause?

Jerry K: Taking the fee discourages fraudulent applications. If the process culls out 10,000 applicants. Have 10,000 applicants a year, brings in \$2 million, which is sufficient. Should talk about this so we aren't creating unnecessary opposition. Would take at least \$100.

Byron: Putting it in statute would allow you to charge more than the cost and fund UEF.

Jerry: Right, the actual cost is closer to \$100.

Dave: The problem with the rationale is it is impossible to justify additional cost just to defer fraud. I agree with Riley's suggestion to just cover the costs.

Carl: The appropriation process will tell you how much more you can spend.

Kevin: A fiscal note attached to the bill generates the appropriation.

Byron: If lose the enforcement and education pieces from this proposal would destroy the whole thing.

Riley: \$200 justification to deter fraud would kill this, do it by rule, and not non-refundable. Have them pay for education and auditing is not reasonable. If need to add to cost to cover the refunds do it.

Jason: Leave the administration fee for non-accepted application at \$17. Staffing and funding levels will not be known if not in statute, this is going to be a problem.

Jerry K: It could make the timeframe tight if we have to develop rules after the legislation is adopted.

Kevin: Should put outer limit.

Bob: Do you have to put dollar amount in or are you looking for alternative language.

Kevin: the legislature doesn't trust agencies.

Jacqueline: What does the department prefer?

Jerry K.: Prefer to set the fee in statute.

Bob: Hate to see dollar amount that is a lightening rod to kill the bill.

Riley: Keep it in the back pocket, to set limit if it becomes a problem.

Jacqueline: Put in statute, but if this exceeds the cost apply excess to UEF. Certainty in the statue could quell the opposition that the amount is too high.

Jerry: \$100 would do it.

Nancy: But don't want to limit self-inflation.

Kevin: The idea is to have in statute so go into this with eyes wide open.

Carl: Do you need UEF if this goes through?

Jerry K: Will still be instances where they are not legitimate, some cases will fall through the cracks.

Kevin: The IC defense is real common in UEF.

Jerry K: The Department is not averse to setting this fee in rule.

John: The majority appears to be in favor of setting the fee by rule.

Jason: If passing this legislation and not enforcing it then we have a problem. Place in statute the fee part of the enforcement mechanism and let them object to it before we react. Is there a downside?

Jerry K: If the legislature passes a bill and leaves the fee at \$17, I will try and kill it.

Riley: In rule, set a minimum processing fee for rejected applications, person should not be paying for the entire program.

Jason: The fee needed to be raised as an enforcement action.

Jacqueline: Don't want this to be a lightening rod. We represent a powerful diverse force of interests. If we put fee in statute we could get it through.

Jason: If Legislature likes the concept we can argue over the dollars.

Riley: Put it in statute and amend as necessary.

Brian: If we left \$200 in here as a cap and the fee is set by department rule there will be a feeling that rule will set the fee at \$200.

Riley: The legislature will set at a bargain rate \$50 - \$75, so set by rule to make it sufficient.

Jerry K: McKinney raised concern over the number of IC's that will come to the session and they probably will.

Larry J: Sub 3 page 20, I would propose the elimination of the provisional requirement to purchase a policy.

Riley: Have a substantial cost to a logger for example. Could be a death nail to the bill. Anyone who puts any effort at all into this can get to 150 points.

Jacqueline: I don't understand the reason for having it in the bill.

Jerry K: How do you get around those who can't meet this? You can't shut them out.

Byron: I question whether the conclusivity would be fine? Start up a business you could easily qualify. A lot cheaper and easier to do the things necessary to get the business established.

Jerry K: If the department denies what option does the applicant have?

Dallas: I looked at 200. Three were denied based on the criteria. It is easy to score the 150 points unless you are not putting any effort into it.

Jerry K: Are we screening out the fraudulent ones?

Dallas: Yes, they won't want to put forth the effort once you educate them they will change their mind.

Byron: If denying it, you are going to have to defend it.

Kevin: Yes, there are appeal rights.

Jerry K: A provisional lets the hiring agent off the hook?

John: Pull out the provisional then?

Jason: If they can't meet it they are an employee.

Larry J: Can the department shut the project down?

Jerry D: But how long will all of this take? If you don't do this by a certain period of time and there is an injury, what happens?

Larry J.: If not revoked yet, still an IC. If revoked an employee.

Jerry K: Give notice to the hiring agent and from that point forward no longer have the protection of the IC.

Larry J: Would like to see a safety net put back for that person.

Carl: Can I file for UI if the department determines I was an employee?

Kevin: Yes, could qualify for UI.

Carl: What about Social Security costs etc.?

Dave: When we were having the discussion we didn't realize it was just for that job.

Jerry K: Sub (3), page 23. How can we give notice when we don't know necessarily who the hiring agent is? Can we put out on the web?

Larry J: Hadn't contemplated any notice in writing or not. I don't care how the notice is given.

Nancy: Some are misrepresentation on the application. You won't know who the hiring agent is.

Larry J: Some folks aren't web savvy.

Jerry K: Would we have to notify 36,000 employers?

Larry J: No, the department does not have any duty to notify anyone. Wait for a triggering event.

Nancy: IC has the responsibility to notify the hiring agent and until then the conclusiveness still remains.

Jacqueline: If revoke, revocation needs to be immediate. Separate issue of whether the hiring agent gets notice. Still conclusive until notice is given or contract date expires. Anyone hiring an IC they need to check a head of time.

Jerry K: Suspension for individual business relationship then the notice is easy.

Riley: Can I request the department to notify me when the IC is revoked?

Jason: Rare that revocation will occur.

Jerry D: Ok with this now that I have an explanation.

Carl: What happens if I alter my certificate that is invalid?

Larry J: No case law on point.

Margaret: A licensed profession could include plumbers and electricians. 4 (d) page 27 needs to be changed.

Jerry D: Who can form a professional corporation, doctors, lawyers etc?

Jacqueline: The persons you are trying to exempt in 4 (d) should be a part of the 401 exemption list.

Kevin: Trying to avoid the pitfall that always arises.

Brian: Learned profession is language that is typically found throughout the country, leave as "learned".

Group: Ok.

Dave: Question whether we need (4) at all. Going to let people we want to get and IC be exempted?

Jerry D: Change IC to only apply to construction. Everyone else is an independent business.

Larry: Maybe we need to back track and reestablish the AB portion of the act. You have an IC exemption and it is conclusive or you cannot have it and rely on the AB or you can get a policy.



Margaret: Pretty good education that you have to get an IC or coverage, so strengthening the requirements will help. Take Larry's idea and in the construction trade you have to have the policy or coverage.

Bob: Don't we get there if we leave 4 and say that service is performed at the business?

Larry: Is there any concern by the legislature that this is untested and unlitigated?

Jacqueline: Put it in 401 so it is a clean list of exemptions.

Kevin: Applicability?

Nancy: If the certificate is issued by the department it applies from the certificate date forward.

Kevin: Would be clean if all the exemptions were done annually, but with 2 years some will be still valid for a year. Could do retroactive to July 1, 2004.

Jacqueline: Applicable for certifications issued on or after 7/1/2004 and notify the others that the certificate is not valid and you may want to reapply.

Bob: May be self-fulfilling because hiring agents will require a new one.

Kevin: Make effective on or after passage of the act.

Nancy: Have rules that will have to be in place.

Kevin: May be able to have rules ready to go.

Nancy: Immediate effective date applying to certifications issued on or after the effective date.

Carl: How do I distinguish between a pre and a post?

Kevin: Have to revise so it is plain on its face.

John: Preparation for the Economic Affairs meeting?

Kevin: Will have redraft out within a week.

John: Final report will be put together.

Nancy: Department presents and we support it or not.

Riley: Has to go to a vote of the membership.

Jerry K: Put it to a vote of the committee, should it be a committee bill, yes or no?

Jacqueline: Manger, Anderson, Raush are holdover senators who would be the sponsors if it was a committee bill.

Pat Murdo: I have a mailing next Tuesday, will include it if you have it ready.